A **MARUTHAVEERAN MURUVAN & ORS v. PUKAZENDIRAN MARUTHAMUTHU**

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIMAH OMAR JCA
B AZHAHARI KAMAL RAMLI JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-1229-07-2022]
30 JULY 2024

C **Abstract** – *An action seeking a declaration to dispute or to challenge the validity of a will is, by its own nature, a probate action under O. 72 r. 1 of the Rules of Court 2012 ('ROC'). Therefore, the provision under O. 72 r. 7 of the ROC is a mandatory provision and shall apply against the appellants' writ action. A probate action cannot be commenced by way of a writ until and unless a citation under O. 72 r. 7 has been obtained prior to the issuance of the writ*

D

SUCCESSION: *Probate – Will – Validity – Action seeking declaration to dispute or challenge validity of will – Whether probate action – Whether probate action could not be commenced by writ until and unless citation under O. 72 r. 7 of Rules of Court 2012 obtained – Non-compliance with mandatory procedures – Whether fatal – Whether there was failure to prove grounds to impugn deceased's testamentary capacity during signing and reading of will – Whether will valid*

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F The appellants and the respondent were siblings. Their late father ('deceased') had executed a will on 4 December 2005. At the time of the execution and open reading of the said will, there were several people in attendance, including the deceased, the deceased's wife, the respondent, the fourth appellant and the fourth appellant's daughter. The deceased passed away in 2009 while his then surviving wife died later in 2010. In due and proper adherence to the deceased's will, the respondent had done the needful
G to ensure that a piece of land ('land') be transferred to his sole proprietorship (as the deceased had intended and as was already known to the appellants). After ten years since the deceased's passing, the appellants conducted a land search which indicated that the said land had been duly transferred to the respondent's sole proprietorship. It took the appellants more than three years
H after their unexpected discovery from the land search to mount a challenge on the validity of the deceased's will and probate order. The appellants had taken out their writ action against the respondent on 5 September 2018, of which the statement of claim ('SOC') sought, *inter alia*, several declaratory reliefs inclusive of a declaration that the will left by the deceased was invalid
I and also a declaration that the grant of probate issued to the respondent was null and void. The High Court Judge ('HCJ') dismissed the appellants' action. Dissatisfied, the appellants appealed. The issues that arose were:

(i) whether the HCJ was correct to dismiss the appellants' claim due to the appellants' non-compliance with the procedures prescribed under O. 72 r. 7 of the Rules of Court 2012 ('ROC') ('first issue'); and (ii) whether the will left by the deceased was valid and that the appellants failed to prove any grounds to impugn the deceased's testamentary capacity during the signing and reading of the will on 4 December 2005 ('second issue'). A B

Held (dismissing appellants' appeal)
Per Azimah Omar JCA delivering the judgment of the court:

(1) An action seeking a declaration to dispute or to challenge the validity of a will is by its own nature, a probate action under O. 72 r. 1 of the ROC 2012. Therefore, the provision under O. 72 r. 7 of the ROC is a mandatory provision and shall apply against the appellants' writ action. A probate action cannot be commenced by way of writ until and unless a citation under O. 72 r. 7 had been obtained prior to the issuance of the writ (paras 26 & 32) C D

(2) The appellants had no justification whatsoever to explain their disregard of the statutory procedures and requirements. The appellants were aware of the mandatory nature of the provision and yet willingly transgressed against the statutory requirement in hopes that this statutory non-compliance could be absolved by asking the court to invoke its inherent powers under O. 1A and O. 2 of the ROC 2012. Since the appellants' breach was against a mandatory rule, the breach was no mere 'technical non-compliance.' Instead, the appellants' failure to observe and adhere to the mandatory requirement for the issuance of the citation under O. 72 r. 7 of the ROC 2012 was an incurable non-compliance that could not be absolved *via* the court's inherent powers under O. 1A and O. 2 of the ROC 2012. Otherwise, the entire framework and procedures demarcating and distinguishing the specificity of a probate action (either within the ROC 2012 itself or even the Probate and Administration Act 1959) would be rendered utterly useless. The appellants' supposition that no prejudice could befall upon the respondent (from the non-compliance) was erroneous. (paras 35, 38 & 39) E F G

(3) Due compliance with mandatory procedures is pertinent as a means to achieve procedural justice in ensuring that parties conduct themselves within the same procedural framework and level playing field. It is also thoroughly unjust to allow one party to flout mandatory rules willy-nilly while the other party strictly ensures due compliance with the rules set. The first issue was therefore answered in the positive. (paras 36 & 45) H

(4) The deceased had the appropriate testamentary capacity to make the said will. There was no undue influence imposed by the respondent upon the deceased. The deceased obtained the land from the Selangor State Government for purposes of agriculture to support his family and it was I

A only reasonable for the deceased to have intended to keep the said land for his family (as per the will). The appellants' 13 years of silence and inaction from the date of the will clearly proved that the appellants' legal action was merely an afterthought and not a *bona fide* action. (para 48)

B **(5)** All of the appellants' allegations of suspicious circumstances and undue influence were all either mere baseless suspicions or afterthoughts. There was a neutral and uninterested party who attended the execution and reading of the will on 4 December 2005, which was the deceased's own wife and the mother to the appellants and the respondent. If indeed the will did not reflect the deceased's intentions, she would have C outright protested against the will and insisted that the deceased's intent of a trust be appropriately reflected within the written terms of the will. But instead, the execution and reading of the will as is, went without event or protest. Even a core representative of the appellants themselves was in attendance during the execution and reading of the will. The D fourth appellant and her daughter both attended the execution and reading of the will. The fourth appellant had all the opportunity to protest and express her chagrin either to the deceased *inter vivos*, her own mother *inter vivos* and even directly against the respondent. All of which the fourth appellant remarkably had outright failed or refused to do for E so many years even after the passing of both the deceased and the deceased's wife. The gaping lapse or delay in time was certainly more probable than not, indicative of the respondent's narrative that the appellants were all fully aware and acknowledge the deceased's real intention to leave the said land (as residual estate) to the respondent's sole proprietorship. (para 53)

F **(6)** There was an inordinate and inexplicable delay in the appellants' pursuit to prosecute their alleged claims against the validity of the will. The fact remained that all the appellants had adopted a stance or conducted themselves in manners which were in admission or at least in G acquiescence with the terms and contents of the will. It would be gravely unjust for the appellants to contend against the will now that the deceased had passed and the said land had already been bequeathed to the respondent 13 years since the execution and reading of the will (which the appellants were privy to). The appellants simply could not approbate and reprobate their stance regarding the validity of the will. H (paras 54 & 55)

(7) The appellants' pleading in and of itself did not open the door for the appellants to challenge the deceased's testamentary capacity. The deceased's alleged blindness, hardness of hearing and him being I wheelchair-bound did not impede on the deceased's sound faculty of mind and testamentary capacity. The deceased was acknowledged to be sane within the threshold of testamentary capacity. The will left by the

deceased was indeed valid and the appellants ultimately failed to prove any grounds to impugn the deceased's testamentary capacity during the signing and reading of the will on 4 December 2005. (paras 57 & 59)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Chin Jhin Thien & Anor v. Chin Huat Yean & Anor [2020] 7 CLJ 137 FC ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Eu Boon Yeap & Ors v. Ewe Kean Hoe [2007] 6 CLJ 791 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Ho Weng Leong v. Ng Kee Chin [1996] CLJU 89; [1996] 1 LNS 89 HC ***(refd)***

Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal [2023] CLJU 827; [2023] 1 LNS 827 CA ***(refd)***

Kok Chee Yoong & Anor v. Wong Lee Yuen [2018] CLJU 1028; [2018] 1 LNS 1028 CA ***(refd)***

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 4 CLJ 47 SC ***(refd)***

Ong Eng Hock & Anor v. Ong Cheng Guan & Anor [2018] 7 CLJ 154 FC ***(refd)***

Sarogini Devy Gurusamy Pillay v. Neelamagam Kurusamy Pillay [2017] CLJU 895; [2017] 1 LNS 895 HC ***(refd)***

Siti Fatihah Diman & Ors v. Diman Hassan & Ors [2021] CLJU 2055; [2021] 1 LNS 2055 HC ***(refd)***

Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA ***(refd)***

Udham Singh v. Indar Kaur [1971] CLJU 144; [1971] 1 LNS 144 FC ***(refd)***

Yap Teck Ngian v. Yap Hong Lang & Ors [2007] 5 CLJ 290 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 1A, 2, O. 18 rr. 7(1), 19, O. 72 rr. 1, 7
Rules of High Court 1980, O. 32 r. 1, O. 72 r. 8

For the appellants - M Manoharan & Sarathbalan; M/s M Manoharan & Co
For the respondent - Thangadurai Govindarajoo; M/s Govin T Durai & Co

[Editor's note: For the High Court judgment, please see Moruvan & Yang Lain lwn. Pukazendiran Maruthamuthu [2022] CLJU 2353; [2022] 1 LNS 2353 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azimah Omar JCA:

Introduction

[1] This appeal before us was filed against the decision of the learned High Court Judge ("learned HCJ") in Shah Alam on 31 May 2022 dismissing the appellants – plaintiffs' writ action with costs of RM15,000.

[2] The appellants – plaintiffs in their writ action had essentially challenged the validity of the will executed by their late father by primarily contending that there were suspicious circumstances surrounding the making of the will and had alleged that the respondent – defendant had exercised undue influence on the testator (the parties' late father) in the execution of the will.

[3] With the above brief summary of the dispute between the appellant-plaintiffs and the respondent – defendant, the appeal before us basically concerns the last will and testament ("said will") left by Maruthamuthu a/l Murugan ("the deceased") on 4 December 2005. In the said will, the deceased bequeathed a piece of land held under Hakmilik PM4194 (formerly known as LM1503), Lot 4329, Tempat Sungai Kelambu, Mukim Tanjung Dua Belas, Daerah Kuala Langat, Negeri Selangor Darul Ehsan ("the said land") measuring at 1.709 hectares solely or exclusively to the respondent who is one of the deceased's seven children.

[4] Prior to the demise of the deceased, the said will was executed by the deceased and read before interested parties (inclusive of the deceased, the deceased's wife, the respondent and the fourth appellant (SP2) and the fourth appellant's daughter (SP1) on 4 December 2005 in which the deceased's intention (under the said will) to make the respondent the sole proprietor of the said land was declared and informed to the parties in attendance of the reading.

[5] The said will had neither mentioned any trust nor stated that the respondent's sole proprietorship was under a trust for the benefit of the other siblings.

[6] For many years since the open execution, declaration and reading of the said will, there was never any protest mounted against the respondent's impending sole proprietorship and entitlement over the said land.

[7] Upon the demise of the deceased on 8 May 2009, the respondent had thereafter applied for a grant of probate to be issued under his name as the executor of the deceased's estate (as per the said will). Subsequently, as intended by the deceased in his will (*vide* the grant of probate dated 16 April 2014 ("probate order")), the said land was thereafter transferred to the respondent and registered under the respondent's name, being the sole beneficiary of the deceased's residual estate under the said will.

[8] Only after 13 years later, that the appellants in an attempt to impugn the validity of the said will (which consequentially impacted the validity of the probate order which was standing in full reliance one the said will), filed a writ action without first complying with the initial procedures prescribed under the clear provision of O. 72 r. 7 of the Rules of Court 2012 namely; the requirement of an issuance of a citation by the Court Registry.

[9] In any case, to have a clear understanding of the dispute between the parties regarding the said will, it is only apt at this juncture for us to briefly set out the background facts that gave rise to the writ action.

Background Facts Of The Case

[10] The appellants and the respondent are siblings. The deceased and his late wife (Sallamal a/p Pathan) (the mother of the appellants and the respondent) lived with the respondent at No 86 Jalan Rambutan 6, Taman Bakti Sungai Manggis, 42700 Banting Selangor. Amani a/p Maruthamuthu ("the fourth appellant/SP2") lived close by at No S82 Jalan Rambutan 6, Taman Bakti Sungai Manggis, 42700 Banting Selangor.

[11] The deceased had executed the will on 4 December 2005. The will was prepared by a will-writing firm known as Rockwills Corporation Sdn Bhd ("Rockwills"). It was never disputed that at the time of execution and open reading of the said will, there were seven people in attendance, namely:

(i) the deceased;

(ii) Sallamal (the deceased's wife);

(iii) the respondent;

(iv) the fourth appellant (SP2),

(v) the fourth appellant's daughter (Subashini a/p Pannerselvam) (SP1);

(vi) staff from Rockwills (Muniandy a/l Thangiah (SD4)); and

(vii) staff from Rockwills (Selvanathan a/l Sengodan (SD1)).

[12] The deceased passed away on 8 May 2009 while his then surviving wife, Sallamal, died later on 21 July 2010. In due and proper adherence to the deceased's will, the respondent had done the needful to ensure that the said land be transferred to his sole proprietorship (as the deceased had intended and as was already known to the appellants).

[13] Only after ten years since the deceased's passing, did the appellants suddenly decide to conduct a land search on 22 July 2015 which indicated that the said land had been duly transferred to the respondent's sole proprietorship.

[14] It also took the appellants more than three years after their 'unexpected discovery' from the land search to mount a challenge on the validity of the deceased's will and probate order.

[15] The appellants had only taken out their writ action against the respondent on 5 September 2018, of which the statement of claim ("SOC") sought for, *inter alia*, several declaratory reliefs inclusive of a declaration that the will left by the deceased was invalid and also a declaration that the grant of probate issued to the respondent was null and void.

[16] Upon hearing *via* full trial, the learned HCJ had dismissed the appellants' action. Dissatisfied with the dismissal, the appellants had filed the present appeal.

The Appeal Before Us

[17] We have perused the appellants' memorandum of appeal, records of appeal, and the parties' respective written submissions and we are of the mind that the appeal before us can be appropriately be disposed by determining the following issues:

(i) first issue: whether or not the learned HCJ was correct to dismiss the appellants' claim due to the appellants' non-compliance with the procedures prescribed under O. 72 r. 7 of the Rules of Court 2012 (O. 72 r. 7); and

(ii) second issue: whether the learned HCJ was correct to find that the will left by the deceased was valid and that the appellants failed to prove any grounds to impugn the deceased's testamentary capacity during the signing and reading of the will on 4 December 2005.

First Issue: Whether Or Not The Learned Judge Was Correct To Dismiss The Appellants' Claim Due To The Appellants' Non-compliance With Procedures Prescribed Under O. 72 r. 7 Of The Rules Of Court 2012 (O. 72 r. 7)

[18] This appeal was first heard 7 March 2024. In the course of submission in opposing the appeal, Datuk Thangadurai, learned counsel for the respondent had sought for permission to first address the court on the issue of the appellants' non-compliance of O. 72 r. 7 of the Rules of Court 2012 ("O. 72 r. 7"). Learned counsel had vigorously contended that the writ action filed by the appellants was fatally flawed as it was filed without a citation being issued by the Registry in accordance to O. 72 r. 7.

[19] Datuk Thangadurai contended that the appellants in their SOC, primarily sought to challenge the validity of the will made by the deceased. In challenging the validity of the will, the appellants also sought a declaration that the grant of probate dated 16 April 2014 issued to the respondent by the Shah Alam High Court be null and invalid and thereby should be revoked. According to learned counsel, any party who wishes to challenge the validity of a will left by a testator (and consequentially seeks the revocation of a grant of probate issued by the High Court) must first obtain a sanction from the court by way of the issuance of a citation *via* the court's Registry pursuant to O. 72 r. 7.

[20] It was not disputed that the appellants had not applied for any citation under O. 72 r. 7. Datuk Thangadurai had submitted that the compliance with O. 72 r. 7 is a mandatory rule and thus, the failure to comply with the same ought to render the appellants' writ action to be a nullity and warranted a

dismissal. To support this contention, learned counsel had cited two decisions namely; a Federal Court decision of *Yap Teck Ngian v. Yap Hong Lang & Ors* [2007] 5 CLJ 290 and a High Court decision in the case of *Sarogini Devy Gurusamy Pillay v. Neelamagam Kurusamy Pillay* [2017] CLJU 895; [2017] 1 LNS 895.

[21] It was also the submission of the respondent that since *Yap Teck Ngian*'s decision is a Federal Court decision, therefore the said decision is binding on us on the *stare decisis* principle.

[22] Mr Manoharan, counsel for the appellants, on the other hand, took an entirely different stand. He insisted that the non-issuance of citation by the Court Registry or non-compliance with O. 72 r. 7 of the ROC 2012 does not prevent the appellants to directly file a writ action to challenge the validity of the deceased's will (allegedly without challenging the probate order in and of itself).

[23] We must mention here that although the parties' written submissions had briefly addressed the issue of non-compliance with O. 72 r. 7 of the ROC 2012 (*albeit* very briefly) the issue was fiercely argued as a chief issue during the first hearing of this appeal. Thus, we were of the preliminary view that the appellants' clear non-compliance with O. 72 r. 7 of the ROC 2012 warranted further depths of submissions by both parties. We had therefore adjourned the hearing of the appeal to 16 May 2024 and directed the parties to conduct further research and ordered the parties to prepare and file their respective supplementary written submissions on this issue under this heading.

[24] First and foremost, it is only apt for us to reproduce O. 72 r. 7 of the ROC 2012 for ease of reference:

> Order 72. Contentious probate proceedings
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> …
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> Citation to bring in grant (O. 72, r. 7)
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> g. **In an action for the revocation of the grant of probate of the will,** or letters of administration of the estate of a deceased person, **a citation** against the person to whom the probate or letters of administration, as the case may be, was or were granted requiring him to bring into and leave at the Registry the probate or letters of administration, as the case may be, **may be issued on the application of the plaintiff.** (emphasis added)

[25] And it was thoroughly crucial that we fully and appropriately appreciate the class or category of cases under the umbrella term of 'contentions probate action' under the same provision. 'Probate action' was defined under O. 72 r. 1 of the ROC 2012 in the following terms:

A a. **"probate action"** means an action;

b. for the grant of probate of the will; or

c. letters of administration of the estate of a deceased person; or

d. for the revocation of such a grant; **or**

B e. **for a decree for or against the validity of an alleged will.**

(emphasis added)

[26] Thus, even if we were to follow (in which we should not) the appellants' segregation between this writ action against the will and an impending separate action to impugn the probate order, the fact still remains C that even an action seeking a declaration to dispute or to challenge the validity of a will is by its own nature, a probate action under O. 72 r. 1 of the ROC 2012. It is therefore, the provision under O. 72 r. 7 of the ROC 2012 is a mandatory provision and shall apply against the appellants' writ action no matter how the appellants may try to turn the stone.

D **[27]** It was argued by counsel for the respondent that the primary objective of the appellants in bringing the writ action against the respondent was to declare the will to be invalid, and consequently set aside the respondent's grant of probate (which consequentially brings the said land back into the estate of deceased).

E **[28]** The respondent further argued that due compliance with O. 72 r. 7 was even more critical considering that the said will had already been acted upon and executed *via* the probate order. The respondent impressed upon this court the chaos that would ensue in court if the validity of a will can be F impugned in a separate and distinct forum (than that of the statutory prescribed forum and procedures to impugn the validity of the probate order). This would lead to mass confusion as it would lead to a bizarre scenario where a probate order can remain valid by court order of one forum, while the will (which was central to the probate order) can contradictorily be invalidated by a separate forum of coordinate jurisdiction.

G **[29]** Much argument had been laid down by both parties regarding the Federal Court decision in *Yap Teck Ngian,* wherein the Federal Court had clearly upheld the mandatory nature of O. 72 of the Rules Court 2012 in initiating any probate action.

H **[30]** The appellants' contention against this Federal Court decision was that that *Yap Teck Ngian* was not concerned with the effect of non-compliance with O. 72 r. 7 of the ROC 2012. The appellants argued that *Yap Teck Ngian* was more concerned with the procedure by which a citation is to be obtained. The appellant insisted that there was no argument made in *Yap Teck Ngian* I on the consequences of failing to obtain an issuance of citation from the court registry before commencing a writ to challenge a will.

[31] Since *Yap Teck Ngian* is a Federal Court decision which should be binding upon us, it is certainly critical that we appropriately appreciate the facts and findings of the Federal Court in *Yap Teck Ngian*:

(i) *Yap Teck Ngian* dealt with a probate action (in the form of impugning the validity of letters of administration granted by the court) which similarly fell within the umbrella term of probate action under O. 72 r. 1 of the previous Rules of High Court 1980 ("RHC");

(ii) the question and issue of the procedures for citation under with O. 72 r. 7 of the RHC (now ROC 2012) arose because the appellants there insisted that the proper procedure to apply for a citation should have been for the respondents to file a summons in chambers under O. 32 r. 1 of the RHC;

(iii) the Federal Court in resolute terms held that specific law prescribed under the RHC for probate action, must prevail over the general provisions of the same RHC. Thus, firstly the writ must be preceded by the issuance of a citation by the Court's Registry under with O. 72 r. 7. Secondly, the proper procedure to obtain the citation was to file a praecipe supported by a verifying affidavit as specifically provided under O. 72 r. 8 of the RHC;

(iv) it was proper and correct of the respondents to apply for the issuance of the citation *via* the filing of the praecipe with the verifying affidavit. It was wrong of the appellants to insist on the general provision governing the filing interlocutory applications *via* summons in chambers (at the time) under O. 32 r. 1 of the RHC; and

(v) compliance with the requirement of the issuance of citation (prior to the issuance of the writ) is mandatory:

> f. Thus, it is clear from the above provisions that before any person can file a writ for the revocation of the grant of a letter of administration, **a citation against the person to whom the letter was granted MUST be issued** to him requiring him to bring into and leave at the court registry the letter of administration (O. 72 r. 7). **The citation MUST be settled** by the court before it is issued (O. 72 r. 8(1)).
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> (see paragraph [6] of the judgment)

[32] Upon our proper appreciation of the Federal Court's grounds of judgment in *Yap Teck Ngian* above, we are in total disagreement with the appellants' supposition that the precedent only dealt with the proper procedures to obtain citation from the Court's Registry. On the contrary, the Federal Court in unequivocal and unmistakable terms had held that a probate action cannot be commenced by way of writ until and unless a citation under O. 72 r. 7 had been obtained prior to the issuance of the writ.

[33] For the avoidance of doubt, there already are precedents which held that non-compliance with the requirement of citation under O. 72 r. 7 is fatal and writs filed in such non-compliance ought to be struck out *in limine*. We first found much guidance from the Court of Appeal's decision in *Kok Chee Yoong & Anor v. Wong Lee Yuen* [2018] CLJU 1028; [2018] 1 LNS 1028; [2018] MLJU 978:

> [17] For the purposes of this appeal the pivotal issue raised before us is whether the learned Judge had erred in law and fact in his failure to take into consideration that the Plaintiff/Appellant had failed to comply with the mandatory requirements of O. 72 ROC 2012 in respect of a contentious probate action.
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> [32] *Authorities have laid down that compliance with O. 72 ROC 2012 is mandatory.* In the case of *Sivanendran s/o Markandoo & Anor v. Dr. Mahendran a/l Markandoo* [1988] 2 MLJ 169, the respondent/plaintiff had brought an action against the administrator and adminstratrix of his deceased father's estate for the appointment of a receiver and other ancillary relief. Seah SCJ who delivered the judgment of the Supreme Court emphasised the mandatory nature of O.72 of the Rules of the High Court 1980 (in *pari materia* with O. 72 ROC 2012) in the following words:
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> > For the purpose of this appeal, we would regard the writ taken out by the plaintiff, Dr. Mahendran a/l Markandoo (the respondent herein) , as probate action albeit the procedure laid down in Order 72 of the Rules of the High Court 1980 has not been complied with. We would like to emphasise that probate actions, whether contentious or non-contentious should comply with Order 71 and Order 72 of the Rules of the High Court 1980.
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> …
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> [35] *The failure to comply with the mandatory requirements of O. 72 of ROC 2012 has been held to be fatal to the probate action.* In the case of *Debaroti Das Gupta v. Deb Brata Das Gupt*a [2015] 7 MLJ 605, the plaintiff had instituted a probate action without following the procedure mandated by O. 72 r. 2 ROC 2012, in particular, there was no prior endorsement of the writ in compliance with the abovementioned Order, as well as O. 72 r. 9 of ROC 2012 in respect of Affidavits of testamentary scripts. *Accordingly, the plaintiff's action was dismissed 'in limine' for the failure to comply with the mandatory procedure under O. 72 ROC 2012.* (See also the case of *Saadon bin Abdullah v. Jamilah bt. Omar* [2011] MLJU 652).
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> [36] Thus due to the *failure of the Plaintiff to comply with the mandatory requirements of O. 72 of ROC 2012* in this probate action, we are constrained to make a *finding that the Plaintiff has not properly brought the matter before this court.* Accordingly, we are of the view that the *Plaintiff's action should be dismissed.* (emphasis added)

[34] In dealing with the issue of mandatory compliance with O. 72 r. 7, the High Court in the case of *Siti Fatihah Diman & Ors v. Diman Hassan & Ors* [2021] CLJU 2055; [2021] 1 LNS 2055; [2021] MLJU 2420 held that: A

> [12] In this case, the Defendants argue as the Plaintiffs had failed to file and issue the required citation under Order 72 rule 7 of the Rules of Court 2012, the whole action should be struck out. The Defendants rely on *Saadon Abdullah v. Jamilah Omar & Ors* [2011] 1 LNS 931 and *Gan Yit Siang @ Goon Yat Huang & Ors v. Chau Fee Kurang @ Mee Ah* [2014] MLRHU 795. B
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> …
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> [14] After considering the arguments put by the Plaintiffs and the Defendants, I find that the Defendants have shown that the Plaintiffs did fail to comply with the *mandatory* requirements of *Order 72 rule 7 and rule 2 of the Rules of Court.* (emphasis added) C

[35] In actuality, the appellants had no justification whatsoever to explain their disregard of the statutory procedures and requirements. The appellants were aware of the mandatory nature of the provision and yet willingly transgressed against the statutory requirement in hopes that this statutory non-compliance could be absolved by asking the court to invoke its inherent powers under O. 1A and 2 of the ROC 2012. D

[36] In light of the categorical and resolute precedents above, we are certainly not inclined to invoke our inherent powers (nor should we invoke the same) to absolve the appellants' inexplicable non-compliance of mandatory rules. The appellants staunchly touted that the court's inherent powers under O. 1A and 2 of the ROC 2012 were (at its forefront) to ensure a fair and just process of the court. However, the appellants sorely missed the second half of the rule which is as equally pertinent. And that second half is that due compliance with mandatory procedures is pertinent as a means to achieve procedural justice in ensuring that parties conduct themselves within the same procedural framework and level playing field. It is also thoroughly unjust to allow one party to flout mandatory rules willy-nilly while the other party strictly ensures due compliance with the rules set. E F G

[37] This rings especially true in respect of mandatory provisions of the ROC 2012. The Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149 had in clear terms held that the court's inherent powers under O. 1A of the ROC 2012 cannot be invoked to remedy mandatory rules or procedures: H

> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. **It must not supersede a mandatory** I

A **requirement of the Rules. Order 1A cannot be invoked when a party intentionally disregards in complying** with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O. 1A of the RHC does not apply as the respondents had intentionally disregarded O. 6 r. 7(2A) for their own reasons.

B …

[48] In the context of the Rules of the High Court 1980 the phrase '… technical non-compliance …' is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature.

(emphasis added)

C **[38]** Since the appellants' breach was against a mandatory rule, then we are constrained by the Federal Court decision in *Datuk Captain Hamzah* (*supra*) to find that the breach was no mere 'technical non-compliance'. Instead, the appellants' failure to observe and adhere to the mandatory requirement for the issuance of the citation under O. 72 r. 7 of the ROC 2012 was an D incurable non-compliance that cannot be absolved *via* the court's inherent powers under O. 1A and 2 of the ROC 2012.

[39] Otherwise, the entire framework and procedures demarcating and distinguishing the specificity of a probate action (either within the ROC 2012 itself or even the Probate and Administration Act 1959) would be rendered E utterly useless. Now, we are also of the view that the appellants' supposition that no prejudice can befall upon the respondent (from the non-compliance) was erroneous. We agree with the appellants that the appellants' insistence that this writ action can stand separately (as a challenge against the will) than that an action to dispute the probate order would indubitably lead to an F undesirable consequence that the same matter (regarding the validity of the probate order *via* the will) shall be litigated twice in two separate forums of coordinate jurisdiction (once as a typical writ action against the will, and the other as a probate action against the probate order also on the impugned validity of the will).

G **[40]** The above clearly could not have been the intention of Parliament. The fact that the umbrella term 'probate action' had been defined to include both an action to impugn a probate order as well as an action to impugn a will, must necessarily mean that Parliament intended that the two be regarded as one for the sake of uniformity and consistency (in line with the H maxim *nemo debet bis vexari* or no man ought to be twice vexed). A duality of proceedings here would lead to unnecessarily protracted litigation in which one singular matter (regarding the validity of a will) shall branch into two forums and thereafter two appeals (with each stage standing the risks of contradicting findings and decisions).

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[41] In an attempt to salvage appellants' case from the fatal non-compliance, Mr Manoharan had listed out several case authorities in the Federal Court and Court of Appeal where Mr Manoharan baselessly assumed that writ actions there have been filed without any reference to a citation. (*Chin Jhin Thien & Anor v. Chin Huat Yean & Anor* [2020] 7 CLJ 137; [2020] 5 AMR; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2004] 2 MLRA 1; *Ong Eng Hock & Anor v. Ong Cheng Guan & Anor* [2018] 7 CLJ 154; [2018] 5 MLRA 89; *Udham Singh v. Indar Kaur* [1971] CLJU 144; [1971] 1 LNS 144; [1971] 1 MLRA 459; *Eu Boon Yeap & Ors v. Ewe Kean Hoe* [2007] 6 CLJ 791; [2008] 2 MLJ 868; *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90; [2002] 4 MLJ 97).

[42] We do not hesitate to find that the appellants' contention here was pure fallacy. Merely contending that these cases had not discussed the mandatory requirement for citation **does not at all prove that these cases did not use citations.** None of these cases outright held that a probate action can directly be commenced *via* writ without having to comply with O. 72 r. 7 of the ROC 2012.

[43] It is also a fallacy for the appellants to baselessly assume that citations under O. 72 r. 7 of the ROC 2012 was not mandatory merely because all of these cases were commenced by way of a writ. Any probate action as a matter of fact must be commenced *via* a writ. Only that the writ is the next or subsequent step only after a citation under O. 72 r. 7 of the ROC 2012 had duly been issued before the writ is filed.

[44] Apart from insisting on the court's inherent powers, the appellants also complained that the respondent ought to be estopped from raising the point on the appellants' non-compliance of a mandatory rule on the supposition that the respondent had neither pleaded nor pre-emptively filed a striking out application under O. 18 r. 19 of the ROC 2012. The appellants in essence tried to paint a portrait as though the respondent had 'slept' on or inordinately delayed his right to object against the appellants' irrefutable non-compliance. A contention which we find to be sorely misguided simply because of the following:

(i) firstly, it is a trite statutory rule of law that pleading must necessarily plead facts and **not law or evidence** (see O. 18 r. 7(1) of the ROC 2012; *Ho Weng Leong v. Ng Kee Chin* [1996] CLJU 89; [1996] 1 LNS 89; [1996] 5 MLJ 139). It was not necessary for the respondent to explicitly plead the appellants' non-compliance of the mandatory rule under O. 72 r. 7 of the ROC 2012; and

(ii) especially in cases of non-compliance of mandatory provisions, that point of law on the fatal non-compliance can be raised at trial despite the fact that the point of law had not been explicitly pleaded. (see Supreme Court in *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 4 CLJ 47; [1994] 3 MLJ 285):

A Even in normal rules on pleadings, *a party may raise a point of law at the trial itself even though it had not been specifically pleaded.* See *Independent Automatic Sales Ltd v. Knowles & Foster* [1962] 3 All ER 27; [1962] 1 WLR 974.

Under the circumstances, we consider that the *applicant was*
B *sufficiently entitled to raise an issue of law as one of his grounds in respect of an allegation of non-compliance with the mandatory provisions* of the Act. (emphasis added)

[45] In view of all the aforementioned deliberations, we hereby answer **the first issue in the positive.** We found that the learned judge was indeed correct
C to dismiss the appellants' claim due to the appellants' clear non-compliance against the mandatory procedures of O. 72 r. 7 of the Rules of Court 2012.

Second Issue: Whether The Learned Judge Was Correct To Find That The Will Left By The Deceased Was Indeed Valid And That The Appellants Ultimately Failed To Prove Any Grounds To Impugn The Deceased's Testamentary Capacity
D *During The Signing And Reading Of The Will On 4 December 2005*

[46] We must emphasise here that considering our answer in the first issue, the merit of the appellants' appeal is already moot. The appellants' case as a matter of fact, shall fall *in limine* as the appellants' probate action had not been properly brought before the High Court in compliance with all the
E mandatory provisions of a probate action. Nonetheless, for the sake of completeness, we will still proceed to determine the merit of the appellants' appeal.

[47] The appellants' pleaded challenge against the validity of the said will was basically entrenched on two grounds namely;
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(i) **alleged suspicious circumstances** surrounding the making of the will;

(a) the deceased had executed the will in the belief that he was appointing the respondent as trustee to hold the said land for the benefit of all his children;

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(b) the deceased did not intend to leave the said land solely to the respondent to the exclusion of his other children;

(c) the will had been prepared with active participation of the respondent who had full interest or full benefit in the deceased's
H estate at the exclusion of other beneficiaries who are also entitled to estate of deceased;

(d) the fourth appellant (SP2) testified (without any documentary evidence) that the respondent *circa* 2005 had suspiciously refused to pass a copy of the said will to SP2 upon SP2's request to have the
I same (but yet somehow for many years failed or refused to act on her 'suspicion');

(e) the first appellant (now deceased at this time of this appeal) also testified that the SP2 had also informed the first appellant of the respondent's alleged refusal to pass a copy of the said will to SP2 (but yet had only lodged a caveat upon the said land on 28 October 2015 which was almost ten years after the alleged refusal by the respondent);

(ii) **alleged undue influence** pressed upon the deceased in making the will:

(a) the will (written in English language) was allegedly not translated in Tamil to the deceased (who was blind as well as illiterate in the English language) before he signed the will;

(b) the will was translated in Tamil by one Selvanathan a/l Sengodan who is a friend to the respondent;

(c) although the fourth appellant (SP2) was present during the execution of the said will, she was also unable to verify the contents of the will as she was also illiterate in the English language; and

(d) the deceased was at risk of undue influence exerted by the respondent considering the fact that the deceased lived together with the respondent and the deceased's late wife.

[48] At the conclusion of the trial, based on the testimonies of the witnesses called by both the appellants and the respondent, the learned HCJ had dismissed the appellants/plaintiffs' action with costs of RM15,000 on the following finding of facts:

(i) the deceased had the appropriate testamentary capacity to make the said will. (see paras. 22 to 24 of the HCJ's grounds of judgment);

(ii) there was no undue influence imposed by respondent/defendant upon the deceased. (see para. 25 of the HCJ's grounds of judgment);

(iii) the deceased obtained the said land from the Selangor State Government for the purposes of agriculture to support his family and it is only reasonable for the deceased to have intended to keep the said land for his family (as per the will). Selling the said land for purposes of distribution would be counter-intuitive against the deceased's primary reason of obtaining the said land. (see paras. 26 to 27 of the HCJ's grounds of judgment); and

(iv) the appellants/plaintiffs' 13 years of silence and inaction from the date of the will clearly proves that the appellants' legal action was merely an afterthought and not a *bona fide* action. (paras. 28 to 30).

[49] The appellants in their amended memorandum of appeal have set out 21 grounds in challenging the learned HCJ's decision. Upon our perusal of the appellants' memorandum of appeal we are minded to highlight a few pertinent points namely:

A (i) the 21 grounds set out in the appellants' amended memorandum of appeal entirely revolved around the alleged suspicious circumstances surrounding the making of the will, and the allegation of undue influence;

B (ii) the appellants in their pleadings had challenged the said will primarily on the grounds of the same alleged suspicious circumstances and undue influence; and

(iii) in the appellants' plaintiffs' issues to be tried, the three issues set out by the appellants also revolved around the alleged suspicious circumstances surrounding the making of the will, and the allegation of undue influence.

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[50] Considering the above, we are in full agreement with the respondent's submission that the appellants neither pleaded any specific fact to challenge the deceased's testamentary capacity nor any facts that the deceased had lacked testamentary capacity in making the will or executing the will. Thus, it was not open upon the appellants to lead any contention against the deceased's testamentary capacity. The main crux of the appellants' allegation was that the deceased allegedly was 'vulnerable' to manipulation, and not that the deceased lacked a sound mind or testamentary capacity.

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E **[51]** Since the appellants' challenge against the will was primarily based on the allegation of suspicious circumstances or undue influence, we find that the learned HCJ had correctly minded himself of the appellants' burden of proof to prove their challenges against the said will. The learned HCJ astutely referred to the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1.

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> As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, *ie*, that **where the validity of a will was challenged,** the **burden of proving** testamentary capacity and due execution lay on the propounder of the will as well as dispelling **any suspicious circumstances** surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery **lay with those who challenged the will.** (emphasis added)

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[52] Having clearly ascertained the position taken by the appellants in so far as the challenge mounted against the validity of the said will, we shall proceed to determine whether the allegations by the appellants impugning the validity of the will had been appropriately inquired by the learned HCJ.

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[53] By and large, the learned HCJ had identified that all of the appellants' allegations of suspicious circumstances and undue influence were all either mere baseless suspicions or afterthoughts. We to agree with the learned HCJ's findings:

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(i) firstly, as against the appellants insistence *ad nauseam* of an alleged trust, the learned judge was insightful to first identify that there was a neutral and uninterested party who attended the execution and reading of the will on 4 December 2005. That personality was none other than the deceased's own wife, and dear mother to all of the appellants and the respondent. It was never the case of either party that their late mother was illiterate or of unsound mind during the execution and reading of the will. Thus, if indeed the will did not reflect the deceased's intentions, she would have outright protested against the will and insisted that the deceased's intent of a trust be appropriately reflected within the written terms of the will. But instead the execution and reading of the will as is, went without event or protest;

(ii) secondly, the learned HCJ correctly appreciated that even a core representative of the appellants themselves were in attendance during the execution and reading of the will. The fourth appellant and her daughter both attended the execution and reading of the will. Considering their own personal attendance, it is far more probable than not that the fourth appellant and her daughter would have sighted or at least would have listened to the will being read. The fourth appellant ought to have personal knowledge of the contents of the will. And if for any reason the fourth appellant was 'shielded' from the terms of the will circa 2005, the fourth appellant had all the opportunity to protest and express her chagrin either to the deceased *inter vivos*, her own mother *inter vivos*, and even directly against the respondent. All of which the fourth appellant remarkably had outright failed or refused to do for so many years even after the passing of both the deceased and the deceased's wife;

(iii) on the same note, if there is any authenticity in the fourth appellant's and first appellant's suspicion as to the respondent's alleged refusal to pass a copy of the will to them, then both the fourth and first appellants similarly had so many years during the deceased's and the deceased's wife's lifetime and even after their passing to protest and insist upon a copy of the will. All of which the fourth and the first appellants remarkably had outright failed or refused to do for so many years even after the passing of both the deceased and the deceased's wife; and

(iv) the gaping lapse or delay in time was certainly more probable than not indicative of the respondent's narrative that the appellants were all fully aware and acknowledged the deceased's real intention to leave the said land (as residual estate) to the respondent's sole proprietorship. Which to our minds (at least as an *obiter dicta*) would make logical sense considering the fact the respondent was the son who was living together and was responsible for caring for the deceased and deceased's wife through their twilight years.

[54] The irrefutable fact is that (as the learned HCJ had identified) there was an inordinate and inexplicable delay in the appellants' pursuit to prosecute their alleged claims against the validity of the will. The fact remained that all the appellants had adopted a stance or conducted themselves in manners which were in admission or at least in acquiescence with the terms and contents of the will. It would be gravely unjust for the appellants now to contend against the will now that the deceased had passed and the said land had already been bequeathed to the respondent 13 years since the execution and reading of the will (which the appellants were privy to).

[55] It is trite that one must be vigilant in prosecuting or protecting one's rights. Indolence and delay in doing so would be unjust against the other party, as that other party would be unable to proceed and deal with his rights with a reasonable measure of certainty and consistency. The same indolence thus would also cause one to sleep and forego his rights to prosecute his claim which he should have done timeously (estoppel). The appellants simply cannot approbate and reprobate their stance regarding the validity of the will. (see *Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal* [2023] CLJU 827; [2023] 1 LNS 827; [2023] MLJU 933; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331; of *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16).

[56] The appellants also raised complaints as to the state of the deceased's health during the execution and reading of the will on 4 December 2005. Nonetheless, it must be reminded that the appellants' pleadings did not challenge the deceased's testamentary capacity. Instead, the ailments complained of by the appellants were raised as facts to support the appellants' allegation that (although the deceased was of sound mind and had testamentary capacity), his ailing condition left him vulnerable to the undue influence exerted by the respondent. In fact, the appellants pleaded enough faith and belief in the appellants' testamentary capacity to the extent that they pleaded that the deceased was able to express his 'true' testament that the land ought to be held on trust.

[57] Thus, although the learned HCJ had embarked on this issue from the aspect of testamentary capacity, we find that the appellants' pleading in and of itself did not open the door for the appellants to challenge the deceased's testamentary capacity. In any case, for the sake of completion, we agree with the learned HCJ that the deceased's alleged blindness, hardness of hearing and him being wheelchair-bound did not impede on the deceased's sound faculty of mind and testamentary capacity. The appellants pleaded that the deceased was still able to effectively communicate *albeit* with some difficulties. The deceased was acknowledged to be sane within the threshold of testamentary capacity as explained in the case of *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90; [2002] 4 MLJ 97:

> Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that *very slight testamentary capacity is required for the making of a will.* The cases in which *wills have been held invalid for lack of testamentary capacity* involve testators who were *utterly insane* either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.
>
> What the law requires to vitiate testamentary capacity is *an insane delusion existing at the time of making of the will.* This will include insanity at the time of the making or giving instructions for the making of the will. There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here. We would merely refer to three.
>
> In *Judah v. Isolyne Bose* 1945 AIR PC 174 Lord Goddard when delivering the advice of the Privy Council held that the *mere fact that the testatrix was unwell when she executed her will was a long way from saying that she had no testamentary capacity.* (emphasis added)

[58] In any case, the appellants' delayed concerns over the alleged 'vulnerability' of the deceased to undue influence, should similarly be estopped on the same grounds we had already deliberated at length above.

[59] In view of all the aforementioned deliberations, we hereby answer **the second issue in the positive.** We found that the learned HCJ was indeed correct to find that the will left by the deceased was indeed valid and that the appellants ultimately failed to prove any grounds to impugn the deceased's testamentary capacity during the signing and reading of the will on 4 December 2005.

Our Decision

[60] We are of the view that the appellants' appeal here is totally devoid of merit, and we hereby dismiss this appeal with costs. The decision of the learned HCJ is affirmed.

[61] We also order total costs of RM15,000 to be paid by the appellants (jointly and severally) to the respondent subject to allocatur.